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IN THE

Supreme Court of the United States

October Term, 1964

No. 269

ANTHONY PORTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, unanimously affirming the judgment of the Supreme Court of the State of New York, County of Kings, convicting him of the crime of Murder in the First Degree.

Petitioner had been convicted by verdict of the Jury of the crime of felony murder, without a recommendation for life imprisonment under the New York Penal Law, Section 1045-a.

The opinion of the Court of Appeals of the State of New York is reported in 15 N.Y. 2d 235.

The judgment and warrant of death against petitioner had been duly stayed on April 19, 1965, by the Chief Judge of the Court of Appeals of the State of New York, pending the hearing and determination of this petition for certiorari.

On April 22nd, 1965, the Court of Appeals of the State of New York duly amended its judgment to provide that no constitutional rights of the petitioner had been violated under the Fourteenth Amendment of the Constitution of the United States.

Summary of the Facts

The petitioner, Anthony Portelli, and his co-petitioner, Jerome Rosenberg were convicted of felony murder without a recommendation for mercy, and sentenced to death on February 18, 1963, after a trial by Jury before Honorable Samuel S. Leibowitz, a Justice of the Supreme Court of the State of New York, County of Kings (171, 183).*

The indictment charged the petitioners, Portelli and Rosenberg, acting in concert with one Anthony Dellernia,** with Murder in the First Degree in the killing of two detectives, Luke Fallon (First Count), and John Finnegan (Second Count), during the commission of a robbery of a tobacco shop on May 18, 1962. Each of the petitioners was armed with a loaded gun. The slain detectives had been on taxicab patrol duty with the 78th Police Squad at the time of the homicide.

---

* Numerals refer to folio numbers in printed record on appeal.

** A mistrial was declared as to the co-defendant, Dellernia (3563-4). He was retried subsequent to the conviction of the petitioners and was acquitted.

Guilt of each of the co-petitioners, Portelli and Rosenberg, had been established beyond a reasonable doubt. Both of them were doubly identified by David Goldberg and Robert Goldberg, the proprietors of the tobacco shop, as the perpetrators of the killing during the course of the robbery.

In addition, the co-petitioner Rosenberg was identified by a witness who confronted him face to face as he ran towards her from the tobacco shop immediately after the commission of the crime (1139-40).

Apart from the direct evidence of the identification, the invincible circumstantial evidence adduced against them was such as to exclude to a moral certainty every other reasonable hypothesis than that of their guilt (*People* v. *Razezicz,* 206 N.Y. 249; *People* v. *Harris,* 306 N.Y. 345; *People* v. *Eckert,* 2 N.Y. 2d 126). Thus, as to the petitioner Portelli:

• The fingerprints found on a check (People's Exhibit 25) picked up between the cash register and the cigar humidor at about 4:30 P.M. on May 18, 1962 was found to be "identical" with Portelli's fingerprints (1400-1406).

Detective Arthur Mandella, the Fingerprint Expert for the Police Department Bureau of Criminal Identification, unequivocally testified that: "I have never in my whole life seen so many characteristics in the same location, with no differences" (1429, 1490-1).

• Portelli's own fingerprint expert, Buck Grene, with a background as Chief of Criminal Identification for the Treasury Department Enforcement Agencies from 1928 to 1952, himself stated that the inked prints and the check

fingerprint "positively" came from the same person and that there was no difference in characteristics between the two (3322-6, 3333-4).

• A second fingerprint expert for the People, Sebastian Francis Latona, Chief of the Latent Fingerprint Section of the F.B.I. testified that the fingerprint on the check and the inked fingerprint "were both made by one finger and that no other finger could make these impressions." He had found a total of 17 points of similarity between them (3687-9).

• Portelli gave a detailed statement of the crime to Richard Melville in the latter's home on Saturday, May 19, 1962 shortly after midnight (1559-63, 1608-9).

• There, harbored by Melville, the petitioner then proceeded to dye his hair black with a dye comb (1591-3). Melville's testimony was corroborated by his wife who stated that she had purchased the black dye comb at a drugstore and brought it home and that Richard dyed Portelli's hair with it (2464-70).

• Melville further testified that Portelli made his getaway to the Lido Motel in Chicago, under the alias of "Jim Davis"; that Portelli had been given a slip of paper containing a notation of his destination, the name "Jim Davis", as well as the name and address and telephone number of Richard Melville (People's Exhibits 56A and 56B).

Corroborating Melville's testimony, the People established that when Portelli was arrested at the Lido Motel in Chicago on May 21st, 1962, the detective ascertained

that he had in fact registered under the fictitious name of "Jim Davis".

• Found in Portelli's motel room at the time was an airline ticket (Peo. Ex. 93) which had been sold by an agent to "J. Davis" at Newark Airport on May 21st, 1962 for 8:15 A.M. Friday flight to Chicago (3375-9).

• As the police officer entered the room, he saw Portelli tearing a paper in two, being People's Exhibit 56A and 56B (3111-14).

This proof of flight, as well as the attempted spoliation of evidence, was clearly indicative of a consciousness of guilt (*People* v. *Deitsch*, 237 N.Y. 300; *People* v. *Reddy*, 261 N.Y. 479).

• Among other items of cogent circumstantial evidence adduced by the People against Portelli, it was established that the clothing worn by him at the time of the robbery, as described by the two Goldberg brothers and various witnesses at the scene, substantially matched the description of his attire given by the witness, Linda Manzione, who had seen Portelli wear a white T-shirt while en route to the robbery in Dellernia's car (2677-9).

• Portelli's sunglasses (People's Exhibit 42) and his hat (People's Exhibit 7), found on the floor of the tobacco shop immediately after the homicide (1191-1207), were identified by Linda Manzione as the articles similar to those worn by him at the time.

• Further, she observed that when Portelli and Rosenberg stepped out of Dellernia's car on 78th Street and New

Utrecht Avenue, the two put their hats and sunglasses on (People's Exhibits 7, 26, 42) (2682-7, 2742), and that Portelli carried a little brown paper bag (2689).

• The ballistics evidence conclusively established that the two bullets extracted from the bodies of the deceased detectives were fired from the .38 special positive revolver (People's Exhibit 5), which was found on the floor of the tobacco shop shortly after the homicide (1892-3, 1827-30).

• In this connection, Portelli's own confession to Melville confirmed the fact that he had dropped the gun in the tobacco shop during the course of the robbery (1608-9).

Neither the petitioner, nor the co-defendant Rosenberg, took the stand in their own defense.

The judgment of conviction had been unanimously affirmed by the New York Court of Appeals under its plenary right and power to review issues of law and fact in a capital case "whether any exceptions shall have been taken or not in the Court below", as mandated by *New York Const. Art. 6 Sec. 7* and *New York Code Crim. Pro. Secs. 517 and 528* (*People* v. *Sherlock,* 166 N.Y. 180, 59 N.E. 830; *People* v. *Nelson,* 189 N.Y. 137, 81 N.E. 768; *People* v. *Creasy,* 236 N.Y. 205, 140 N.E. 563; *People* v. *Crum,* 272 N.Y. 348, 6 N.E. 2d 51; *People* v. *Peller,* 291 N.Y. 438, 52 N.E. 2d 949; *People* v. *Leyra,* 302 N.Y. 353, 98 N.E. 2d 553).

POINT ONE

The due process requirements of full and fair disclosure of all the facts surrounding the testimony of the witness Melville were fully satisfied.

I

The New York Court of Appeals held at bar:

> *"Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury.* (See 3 Wigmore, Evidence (3d ed., 1940), Sec. 815, pp. 230-231). *The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.*
>
> *In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melforum is available for these charges of misconduct."*
> *ville testified and we simply note that an appropriate forum is available for these charges of misconduct."*

The due process test applicable to the testimony of a witness is that of full and fair disclosure of all the facts affecting his credibility. (*Mooney* v. *Holahan,* 294 U.S. 103, 112; *Pyle* v. *Kansas,* 317 U.S. 213; *Napue* v. *Illinois,* 360 U.S. 264; *Brady* v. *State of Maryland,* 373 U.S. 83; *United States ex rel. Meers* v. *Wilkins,* 2nd Cir. 326 F. 2d 275, 282; *People* v. *Savvides,* 1 N.Y. 2d 554; *People* v. *Zimmerman,* 10 N.Y. 2d 430; *People* v. *Mangi,* 10 N.Y. 2d 86; *People* v. *Robertson,* 12 N.Y. 2d 355; *People* v. *Fazio,* 14 N.Y. 2d 716.

After testifying that he had been beaten by the police before disclosing to them that Portelli had made a detailed confession of the crime to him, Melville unequivocally told the jury at the trial that his testimony was the absolute truth, as was the testimony that he had given to the Grand Jury (1759-60).

Likewise, Fernanda Melville, his wife, affirmed the truthfulness of her testimony before this jury, notwithstanding her statement that she had previously been in fear regarding their involvement in this case (2482-90).

The District Attorney, in his summation, told the jury:

> "We come to Richard Melville and to Richard Melville's wife Fernanda. He testified that when he was in the precinct on Sunday night at about 10:30, he was beaten; he was kicked; he was assaulted with cigarette butts held by the police and put to the back—to his back; that he was in such pain and in such suffering—I don't condone those actions. I don't condone them on the part of the police or anyone else, and particularly, the police. It is an absolute outrage in these times where people have to be subjected to that practice and to that conduct, to

> go through that pain and suffering by these police. Notwithstanding their enthusiasm, notwithstanding their eagerness to get the proper defendant, they had no business to do that which was described by Melville, and it shall not rest here either. But yet, during the two and a half hours of these pains and these sufferings through which this man experienced, he said he didn't know Portelli. He said he didn't know Rosenberg, and he said he didn't know Dellernia.
>
> But the fact of the matter is that he knew Portelli and for two and a half hours he denied that he knew him. So when he admitted under this pain and this assault by the cops upon him, he admitted that he knew Portelli, and the fact remains that defense counsel, in putting this woman on the stand, Mrs. Frankolino, she admits that she knew Portelli, and that her brother Frank Lino was a friend of Portelli'' (3921-4).

And the Court, training the searchlight of truth on the credibility of the witness, forthrightly charged the jury as follows:

> ''Now the question is, did he confess to Melville? What about Melville? Who is Melville? What is his background? He is an ex-convict. He is a bookmaker living outside of the pale of the law. He is a no good loafer. I wouldn't trust him further than I could 'throw a stick,' based on his background. Now I can't be any more forthright than that, can I? I wouldn't 'convict a dog' on his testimony, standing alone, much less a human being, unless there was other evidence which backed up his story, which bolstered his credibility. Do you understand what I am saying—unless there was other evidence in the

case which backed him up, evidence that I believed beyond a reasonable doubt'' (4145-6).

* * * and further, at fols. 4149-54:

''Now what happened to Melville? He tells us that the police grabbed him at about 10:30 P.M. on May 21st, and took him in for questioning; that he was asked if he knew the defendants; if he knew Portelli, if he knew Rosenberg, if he knew Dellernia. He said, 'I don't know these people.' He said that he lied about it, that he lied to the police; that he kept his mouth shut about knowing these people, and although they gave him an unmerciful beating, which would do credit, if I can call it 'credit,' to a gestapo wretch in Hitler's camps; although they gave him an unmerciful beating, he would not open up and say that he knew these people. Even when John Dellernia was on a bed in a bedroom, being 'given the works,' as they say by the cops, when John Dellernia identified Melville, Melville refused to say that he knew John Dellernia. He stood pat; but finally he couldn't stand the pain any more. He couldn't stand the torture, and he opened up. Then the story was told.

What about Melville's beating, which he undoubtedly received at the hands of the police, which is reprehensible. I suppose, as you and I sat here in this courtroom and listened to this tale, we were nauseated; at least I was nauseated, and as Assistant District Attorney Selzer so forthrightly stated, these cops, who gave this man a beating in that station house, deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort, and I believe that the District Attorney was correct in appraising the conduct of these men in the man-

ner that Mr. Selzer did, and in the manner that the other attorneys did too. But what about his testimony? Is his testimony to be ruled out, to be disregarded just because the cops gave him a beating, and for no other reason?

The answer to that question is no. It would be different if a defendant were coerced, and they tried to use a confession against him. Then the law is simple. Then that statement of his would never reach the ears of a jury. But the law is different in the case of a witness, and the jury may consider the beating, and determine whether or not, in spite of the beating, he came in here and he told the truth as to what happened between him and Portelli in his house on that Sunday until Portelli allegedly left in the car to skip to Chicago.

I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

Thus, unlike the cases dealing with coerced confessions of an accused, all bearing the imprint of an "inherent untrustworthiness" (*Spano* v. *New York,* 360 U.S. 315, 320-321) and "probable unreliability" (*Jackson* v. *Denno,* 12 L. ed. 2d 908, 921), Melville's testimony was vested with the imprimatur of credibility under the careful and circumspect instructions of the trial court.

What is decisive as to the due process claim by petitioner is that the witness' testimony as such in no way violated petitioner's right against self-incrimination, for his con-

fession to the witness was indisputably voluntary and uncoerced.

Hence, this is not a case where the State "wrings a confession out of an accused against his will" (*Blackburn* v. *Alabama,* 361 U.S. 199); or deigns to "prove a charge against an accused out of his own mouth" (*Malloy* v. *Hogan,* 377 U.S. 1, 12 L. ed. 2d 653, 659); or infringes in the slightest degree on the irretractable principle of criminal justice that " the rack and torture chamber may not be substituted for the witness stand." (*Brown* v. *Mississippi,* 297 U.S. 278.)

The underlying fallacy of petitioner's argument is that it is hoisted on the entirely erratic premise that Melville's testimony was "coerced testimony" (Pet. Br. p. 6), which it decidedly was not. Quite to the contrary, Melville's *testimony* was wholly voluntary on the witness stand.

It was testimony given under the aegis and protection of the trial Court, with every sanction of cathartic cross-examination available to the petitioner.

Thus, unlike the vicarious impact of admissions resulting from a coerced confession wrung from an accused, this was the uncoerced and direct testimony of a witness given under entirely wholesome credentials of reliability.

In the words of this Court, in *Maddox* v. *United States,* 156 U.S. 237, 242-3, it was testimony which fully satisfied every standard of a fair trial, including:

> " * * * *a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they*

> *may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*"

This Court's recent decision in *Malloy* v. *Hogan*, 377 U.S. 1, 12 L. ed. 2d 653, is dispositive of the constitutional issue. In *Malloy*, this Court enunciated the new basic constitutional doctrine that the admissibility of a coerced confession in a State criminal prosecution shall be tested not by the due process clause, or "whether the conduct of State officers in obtaining the confession was shocking", but rather, by the standard of the Fifth Amendment's command against self-incrimination.

If, then, as to an *accused*, "the constitutional inquiry is not whether the conduct of state officers in obtaining a confession is shocking, but whether the confession is free and voluntary * * * —in other words, the person must not have been compelled to incriminate himself"—then it logically follows that testimony of *a person other than an accused individual* cannot be constitutionally objected to on that ground, because no right against self-incrimination has been violated.

Accordingly, applied to Melville's testimony, the constitutional inquiry is not as to whether the conduct of the police in obtaining the evidence was "shocking", but solely whether the witness' testimony was given freely and voluntarily, with all-out disclosure to the jury of all the relevant facts, so as to assure to petitioner an absolute fair trial under procedural due process of law.

Rochin v. *California*, 342 U.S. 165, patently enough, is plainly inapposite. There, the victim of the constitutional

deprivation of due process was the *accused* on trial, and not a witness as here.

There, unlike here, the forcible extraction of incriminating evidence from the stomach of the accused—which the Court properly denounced as "conduct that shocks the conscience"—directly violated the constitutional right *of the accused* against compulsory self-incrimination (*See concurring opinion of Mr. Justices Black and Douglas; Malloy* v. *Hogan, supra*).

Thus, within its own consensus, the reach of *Rochin* cannot constitutionally apply to the situation at bar.

II

In any view of this case, petitioner is utterly without legal standing to urge upon this Court that the insidious tactics practiced by the police against the witness rendered his testimony constitutionally inadmissible.

Directly analogous here is the constitutional proscription against unreasonable searches and seizures, available only as to one "who has standing to complain" (*Jones* v. *United States,* 362 U.S. 257; *Ker* v. *California,* 374 U.S. 23).

The right to due process of law is one personal to the accused. "The rule (*Rochin* v. *California, supra*), does not apply unless the person upon whom the atrocity was committed is the defendant on trial" (*8 Wigmore Evidence, sec. 2184a, p. 50, McNaughton Rev. 1961*).

Comporting with our position herein, petitioners made no objection to the admissibility of Melville's testimony, nor did they take exception to the Court's instructions thereon.

III

There is a complete absence of any authority for the proposition urged upon this Court that coercion practiced upon a witness should be equated to the rule governing the admissibility of out-of-court confessions extracted from an accused.

As a practical matter, there is no logical basis for such equation in view of the fundamental differences inhering between the two types of testimony, as already aforenoted.

Again, petitioner's argumentative projection at bar, if ever adopted, could not but lead to results gravely inimical to the public interest and to the sound administration of criminal justice.

The great climactic quest for truth in the judicial process would be seriously compromised in the chaotic shuffle of endless *voir dire* examinations pervading criminal trials.

Consistent with the rote common to coerced confessions generally, the range of inquiry would likewise have to embrace all patterns of coercion: physical violence as well as the "more sophisticated modes of persuasion" (*Blackburn* v. *Alabama,* 361 U.S. 199; *Rogers* v. *Richmond,* 365 U.S. 534; *Hysler* v. *Florida,* 315 U.S. 411, 413).

The broad judicial inquiry would perforce have to apply to sundry testimony from witnesses of diverse nature, whether testifying to a confession as here, or to such other material issues as a disputed identification, or the corroboration of an accomplice, or to matters in rebuttal for the prosecution, among all others.

Typically illustrative of the intolerable stresses to which the judicial process would thus be subjected would be the very case at bar, where practically every one of the People's major witnesses (Louis Ferrara, Linda Manzione, Fernanda Melville, Richard Melville, David Goldberg, Robert Goldberg) would have had to run the gauntlet of *voir dire* examination as to the "competency" of their testimony by advance ruling of the trial court, as had been urged by the petitioner in the Court below.

The demands of due process should not be so stretched as to impose intolerable standards on the fair conduct of a criminal trial, or to fasten "fetters of unreason upon the States" (Mr. Justice Frankfurter, in concurring opinion, *Adamson* v. *Calif.*, 332 U.S. 46).

> *"The problem is that of achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other."*
>
> *People* v. *Waterman*, 9 N.Y. 2d 561.

In *Columbe* v. *Connecticut*, 367 U.S. 568 at p. 588, the Court stated:

> *"Due process does not demand of the states, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt."*

In *Rochin*, this Court laid down the guiding principle, at p. 168:

> *"Due process of law * * * is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice".*

And at p. 172:

> *"Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355, 52 L. ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560, *on a judgment not ad hoc and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society".*

POINT TWO

The taking of Portelli's fingerprints violated no constitutional rights of this petitioner.

I

The taking of Portelli's fingerprints deprived him of no right against self-incrimination, for the Fifth Amendment is essentially aimed against testimonial compulsion only.

The petitioner's position at bar leads absurdly to the ineluctable corollary that even routine fingerprinting, photographing or blood grouping tests of an accused for the purpose of police booking following an arrest (*Section 940, Code of Criminal Procedure*), and the use of identification evidence obtained thereby, would be violative of the right against self-incrimination.

Equally absurd would be the sister corollary that no victim of a crime may ever view the accused for the purpose of an identification at a police lineup, or even in a courtroom, without running afoul of the prisoner's constitutional rights.

In *Holt* v. *United States*, 218 U.S. 245, it was argued that the Fifth Amendment forbade the testimony of a witness that a blouse claimed to belong to the accused had been put upon the prisoner and that it fitted him.

Speaking for a unanimous Court, Mr. Justice Holmes labeled such an argument "an extravagant extension of the Fifth Amendment." Said the Court at pp. 252-3:

> *"Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams* v. *New York*, 192 U.S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372."

The petitioner's position at bar, we respectfully submit, is an equally extravagant extension of the Fifth and Sixth Amendments alike.

Pointing up the essentiality of "testimonial compulsion" as a prerequisite to the self-incrimination privilege, *Wigmore* states as follows:

> "If an accused person were to refuse to be removed from the jail to the courtroom for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.
>
> The limit of the privilege should be plain. From the general principle, it results that an inspection of the bodily features by the tribunal or by witnesses does not violate the privilege because it does not call upon the accused as a witness—i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial, unless all bodily action were synonymous with testimonial utterance; *for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion.* What is obtained from the accused by such action is not testimony about his body, but his body itself. *Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a*

testimonial one. Moreover, a practical consideration applies to this class of evidence. When the person's body, its marks and traits, itself is in issue, there is ordinarily no other or better evidence available for the prosecutor.

Hence, the public interest in obtaining the evidence is usually sufficient to outweigh by a clear margin the private interests sacrificed in the process.

Both principle and practical good sense forbid any larger interpretation of the privilege in this application." (Italics ours.)

8 Wigmore, Evidence, Section 2265, p. 386 (*McNaughton Rev.* 1961).

In *United States* v. *Kelly* (C.A. 2d) 55 F. 2d 67, the Court held that fingerprints of one charged with an unlawful sale of liquor may lawfully be taken by federal officers at the time of the arrest.

In *United States* v. *Nesmith,* 121 F. Supp. 758, District Judge Holtzoff, citing a long line of precedents, held:

"The law is clear, therefore, that the privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence."

In *Shaffer* v. *United States,* 24 App. D.C. 417, 426, the Court of Appeals for the District of Columbia in an opinion written by Chief Justice Alvey, wrote as follows:

"This objection is founded upon the theory that the use of the photograph so obtained is in violation of the priciple that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this

> *objection. In taking and using the photographic picture there was no violation of any constitutional right. There is no pretense that there was any excessive force or illegal duress employed by the officer in taking the picture.* We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that, without such means, many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark, in court, to enable witnesses to identify him as the party accused as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification."

In *East* v. *State*, 1955, 197 Tenn. 644, 277 S.W. 2d 361, the taking of fingerprints was specifically held to be beyond the pale of the privilege against self-incrimination by testimonial compulsion. To the same effect, is *United States* v. *Iacullo*, C.A. Ill. 1955, 226 F. 2d 788; *State* v. *Lei*, Wash. 1961, 365 P. 2d 609.

We note finally the dissent of Mr. Justices White, Clark and Stewart in *Escobedo* v. *Illinois*, 378 U.S. 478.

> "It is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States. Malloy v. Hogan, 378 U.S. 1, 12 L. ed. 2d 653, 84 S. Ct. *That amendment addresses itself to the very issue of incriminating admissions of an accused*

> ***and resolves it by proscribing only compelled statements.*** Neither the Framers, the constitutional language, a century of decisions of this Court nor Professor Wigmore provide an iota of support for the idea that an accused has an absolute constitutional right not to answer even in the absence of compulsion—the constitutional right not to incriminate himself by making voluntary disclosures." (Italics ours)

Bynum v. *United States*, 262 F. 2d 465, cited by petitioner (Br. 19-21), is clearly distinguishable. There, the holding was that the fingerprinting of an accused, taken during an illegal arrest, was violative of the defendant's rights against a constitutionally proscribed seizure or arrest under the Fourth Amendment.

Here, the legality of the arrest is not in question.

II

Portelli's constitutional rights to counsel were in no way violated:

1. The fingerprinting took place before any judicial proceedings had been commenced against him, either by way of arraignment or indictment in any Court.

2. The record is devoid of any showing of deprivation of the right to counsel under the Sixth Amendment, in that there was no request for, or refusal of, counsel at any time.

3. In the circumstances at bar, the taking of Portelli's fingerprints, in the absence of counsel, and without warning of his right against self-incrimination, was not in violation of petitioner's due process rights under the Fourth and Fourteenth Amendments.

It is the general rule that the right to counsel becomes operative only with the formalization of judicial proceedings against the accused (*People* v. *DiBlasi*, 7 N.Y. 2d 544; *People* v. *Waterman*, 9 N.Y. 2d 561; *People* v. *Meyer*, 11 N.Y. 2d 162; *People* v. *Rodriguez*, 11 N.Y. 2d 279; *People* v. *Gallo*, 12 N.Y. 2d 12; *People* v. *Davis*, 13 N.Y. 2d 690; *People* v. *Robinson*, 13 N.Y. 2d 296; *Spano* v. *New York*, 360 U.S. 315; *Massiah* v. *United States*, 377 U.S. 201).

In *Escobedo* v. *Illinois*, 378 U.S. 478, Mr. Justice Stewart in a separate dissenting opinion, noted:

> *"Under our system of criminal justice, the institution of formal, meaningful, judicial proceedings, by way of indictment, information, or arraignment, marks the point at which a criminal investigation has ended and adversary litigative proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial."*

Likewise, this case involves no deliberate bypassing of counsel, or refusal to grant the aid of counsel in situations where it is specifically requested by an accused (*People* v. *Spano*, 4 N.Y. 2d 256; *People* v. *Noble*, 9 N.Y. 2d 571; *People* v. *Donovan*, 13 N.Y. 2d 148; *People* v. *Failla*, 14 N.Y. 2d 178, *Escobedo* v. *State of Illinois*, 378 U.S. 478).

Here, in stark contrast, Portelli made no request for counsel following his arrest, nor was there the faintest suggestion of any conduct offensive to the ordered concept of liberty in connection with the taking of the fingerprints which could have triggered any special need for counsel at that time (*People* v. *Gunner*, 15 N.Y. 2d 226; *State* v. *McLeod*, Ohio Supr. Ct. December 29, 1964, 33 USLW 2351;

State of Utah v. *Sullivan*, 227 F. 2d 511, *cert. den. sub nom.*, *Braasch* v. *Utah*, 350 U.S. 973; cf. *Wade* v. *Mayo*, 334 U.S. 672, 684, and *Hamilton* v. *Alabama*, 368 U.S. 52).

In short, there is no showing to the slightest degree, at bar, of "abdication through unawareness of * * * constitutional rights." (*Escobedo* v. *Illinois, supra*, at p. 490). In essence, the principles enunciated by this Court in *Crooker* v. *Calif.*, 357 U.S. 433 and *Cicenia* v. *Lagay*, 357 U.S. 504, are here directly controlling.

III

In this connection, no objection was taken to the fingerprint evidence of Portelli on the specific grounds predicated on the Fifth and Sixth Amendments now urged before this Court. Accordingly, the point is not now available for appellate review (*On Lee* v. *U.S.*, 343 U.S. 747, footnote 3; *People* v. *Gallo*, 12 N.Y. 2d 12; *People* v. *Kelly*, 12 N.Y. 2d 248; *People* v. *Coffey*, 11 N.Y. 2d 142; *People* v. *O'Neill*, 11 N.Y. 2d 148; *People* v. *Friola*, 11 N.Y. 2d 157).

POINT THREE

The petitioner received a fair and impartial trial by an unbiased jury.

I

The record will show that when the jury had been finally selected, the defense had not exhausted all its peremptory challenges (253).* Further, counsel for Rosenberg, as well as the co-defendant Dellernia, had expressed themselves as satisfied with the jury. Counsel for Portelli stated that

* Numerals refer to Minutes of Proceedings on Selection of Trial Jury.

he had "no challenges either peremptory or otherwise" (252).

This jury had been carefully selected with a view of securing an absolutely fair and impartial trial for the accused. Six of the fifteen jurors and alternates selected had read nothing at all about the case (*Clevenger*, 294-5, 301; *Redmond*, who may have read only headlines on it but had heard nothing about the case 497-8; *Sauter*, 611; *Robinson*, 853-5; *Raymond*, 880-1; *Young*, 887).

Of the remaining jurors selected, one (*Everett*) was not at all asked whether he had seen any publicity regarding the case (828-839); five others stated they had only a vague recollection of it (*McCaa*, 280-2; *Burch*, 353; *Friese*, 729; *Sylva*, 808-810; *Mone*, 915-916). Several of the latter had no recollection of even reading anything at all about the arrest, or knowing anything about the background of these appellants. In all, only one juror stated that he had read something about Rosenberg's "having a record of some sort" (122-3), adding that although he had read about the crime, "he don't remember much about it" (183).

II

Portelli's motion for a change of venue "to the Counties of Onondaga, or Erie, or Oneida" (4489) pursuant to Section 346 of the Code of Criminal Procedure, had been properly denied by the Appellate Division of the Second Judicial Department on January 11, 1963 (18 A.D. 2d 820).

In opposition to that motion, the answering affidavit of the District Attorney set forth as follows:

That the motion for the change of venue was not made until the very eve of trial, after a special jury panel of 250 veniremen had been selected on January 3, 1963, all of whom had been notified to appear for service on January 14, 1963; that though the indictment had been pending since July 25, 1962, no proceeding had been commenced for a change of venue during the entire six month period preceding the date of trial; that, therefore, the motion was wholly lacking in good faith and was conceived only as an afterthought in an attempt to delay the trial.

Further, that it was inexplicable why the change of venue was sought specifically to the Counties of Onondaga, or Erie, or Oneida, particularly inasmuch as the leading newspapers in thos counties likewise carried equivalent newspaper publicity regarding the crime and apprehension of these appellants during the month of May, 1962; therefore, that in view of the statewide newspaper publicity which this case had received, "it is obvious that whatever prejudice may have resulted could best be dissipated by a trial in the great population center of Kings County which would best assure the ultimate selection of an impartial and unbiased jury" (p. 3, Aff. in Opp.).

Further, that the passage of over seven months since the commission of this crime and the arrest had long obscured the incident in the public mind; that the crowding of important news events had all but put the pending homicide prosecution "in the limbo of yesterday's forgotten news" (p. 4, Aff.); that during the interval of time between his apprehension and the date of trial, the press had been filled daily with such overpowering news developments as the grave Cuban missile crisis, the brinkmanship of a threat-

ened nuclear war with Russia, and other international news events converging in the New York City headquarters of the United Nations; that during the same interval, the public mind had also been distracted by the impact of such news events as the catastrophic stock market crash of May 28, 1962, and the Meredith civil rights explosion involving the armed intervention of United States troops.

Further, that a newspaper strike had been in progress in its 34th day preceding the making of the motion for the change of venue, producing "an almost total blackout of news reporting involving this or any other case of newsworthy interest, whereas the press services of the counties to which the petitioner seeks to have this case removed for trial, had retained their normal reporting services throughout" (p. 4, Aff.).

Finally, that the trial was to be by a special jury under Section 749(aa) of the Judiciary Law; that under the statute, no special juror is eligible to serve "who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *"; that two of the three Counties (Oneida and Onondaga) to which removal of the trial had been sought by these appellants, would not have been able to offer to them the protection of a sifted special jury for the reason that the population of these Counties is under one million, the minimum required by statute for the authorization of a special jury; that as to the third County (Erie), a special jury is rarely, if ever, used in any case (Aff. pp. 4-5).

III

On this recital of the facts, it is manifest that the denial of petitioner's motion for a change of venue had been proper in the sound judicial discretion of the Appellate Division below.

The general principle set forth by the United States Supreme Court in *Irvin* v. *Dowd*, 366 U.S. 717, at pp. 722-723, is here directly applicable:

> *"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."*

In *Irvin* v. *Dowd, supra,* this Court held, in an altogether different factual setting, that a conviction was violative of due process where intensive publicity given to the defendant's confession to six murders rendered a fair trial impossible. Said the Court at p. 727:

> *"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, cf. Stroble* v. *California,* 343 U.S. 181, 96 L. ed. 872, 72

> S. Ct. 599, *was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.*"

The wrongful publicity in *Irvin* extended to defendant's offer to plead guilty if promised a 99-year sentence; that he had confessed to 24 burglaries; that many of the stories described him as "a confessed slayer of six", a parole violator and fraudulent-check artist; that on the day before the trial, the newspapers carried the story that Irvin had orally admitted the murder of the victim in this case, as well as the murder of five other named individuals.

There, too, no less than 268 of the jury panel of 430 were excused on challenges for cause because of fixed opinions as to Irvin's guilt; the maximum number of peremptory challenges were interposed; 90% of all the prospective jurors questioned "entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty."

All these factors in *Irvin* v. *Dowd*, or any combination of them, were completely non-existent in the case at bar.

In *Reynolds* v. *United States* (1879), 98 U.S. 145, this Court stated:

> "*In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best*

fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . The finding of the trial court . . . ought not to be set aside by a reviewing court, unless the error is manifest."

CONCLUSION

The petitioner had been duly convicted under due process of law. The petition for certiorari should be denied.

Dated: Brooklyn, New York,
July 1965.

Respectfully submitted,

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